



August 15, 2001

Mr. Steve Aragón
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2001-3599

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150750.

The Texas Health and Human Services Commission (the "commission") received a request for eleven categories of information relating to an investigation of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that some of the submitted information comes within the scope of section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (17) (emphasis added). The commission must release the requested information that is subject to section 552.022(a)(3) and (17), unless that information is expressly confidential under other law. Section 552.108 of the Government

Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision No. 177 (1977) (addressing statutory predecessor). As such, this exception is not other law that makes information confidential for the purposes of section 552.022.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common law right of privacy. Information must be withheld from disclosure under section 552.101 in conjunction with common law privacy when the information (1) is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) is of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In prior decisions, this office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to a public body about an individual and basic facts regarding a particular financial transaction between the individual and the public body).

In this instance, the documents that are subject to section 552.022 contain financial information concerning a private individual, including information relating to financial transactions between the individual and a governmental body. As there is a legitimate public interest in the financial transactions between this individual and a governmental body, the commission must release the information that relates to those transactions under section 552.022. We have marked that information accordingly. The rest of the personal financial information that is subject to section 552.022 does not involve transactions with a governmental body. This information is protected from public disclosure under section 552.101 in conjunction with common law privacy. Ordinarily, the commission would be required to withhold this private information, which we also have marked. In this instance, however, the requestor appears to be an attorney for the individual to whom the private information pertains. If the requestor is this individual's attorney, then he has a special right of access under section 552.023 of the Government Code to information that is protected from public disclosure by his client's common law right of privacy.¹

¹Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."

Some of the documents that must be released under section 552.022 contain an individual's social security number. If the requestor is this individual's attorney, then he has a special right of access to her social security number under section 552.023. If not, then this social security number may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990.* See Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, nor are we aware of any law enacted on or after October 1, 1990, that authorizes the commission to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security number in question was obtained or is maintained pursuant to such a statute and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. See Gov't Code §§ 552.007, .352. Therefore, prior to releasing a social security number, the commission should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Another document that must be released under section 552.022 contains an account number. The Seventy-seventh Legislature recently added section 552.136 to chapter 552 of the Government Code.² This newly enacted exception to public disclosure makes certain account numbers confidential. Senate Bill 694 was passed on May 14, 2001, became effective when it was signed by the Governor on May 26, 2001, and provides in relevant part:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

²The Legislature also enacted two other bills that add a section 552.136 to chapter 552. One is House Bill 2589, which makes certain e-mail addresses confidential. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The other is Senate Bill 15, which makes information maintained by family violence shelter centers confidential. See Act of May 14, 2001, 77th Leg., R.S., S.B. 15, § 1 (to be codified at Gov't Code § 552.136). In addition, Senate Bill 694 enacted the same language from House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 of the Government Code.

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). We have marked the information that the commission must withhold under section 552.136.

With respect to the information that is not subject to section 552.022, we next address your claim under section 552.108 of the Government Code. Section 552.108, the "law enforcement exception," provides in relevant part that "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that raises an exception to disclosure under section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to that information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You inform this office that the requested information relates to the provision of services under the Medicaid program, for which the commission is the responsible state agency under federal law. You further explain that this information relates to an investigation that the commission has referred to the Medicaid Fraud Control Unit (the "MFCU") of this office. You have submitted a copy of a letter from the MFCU to the commission, confirming the referral of the case. We also received comments from the MFCU, indicating that the requested information relates to a pending criminal investigation. Based on your representations, the comments submitted by the MFCU, and our review of the remaining information at issue, we find that the release of this information would interfere with the detection, investigation, or prosecution of crime. Therefore, the information that is not subject to section 552.022 of the Government Code may be withheld from the requestor under section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); *see also* Open Records Decision No. 372 at 4 (1983) (stating that where alleged criminal conduct remains under active investigation or prosecution, law enforcement exception may be invoked by any proper custodian of related information).

In summary, some of the requested information is subject to section 552.022 of the Government Code. The commission may be required to withhold some of this information under section 552.101 of the Government Code, unless the requestor has a special right of access under section 552.023. A small amount of information must be withheld under section 552.136. With these exceptions, the information that is subject to section 552.022 must be released. The commission may withhold the remaining requested information under section 552.108.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

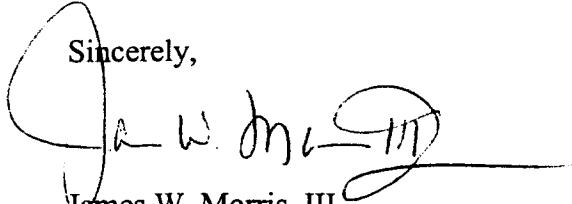
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 150750

Enc: Marked documents

c: Mr. Walter C. Muse, Jr.
Law Offices of Gary L. Bledsoe
316 West 12th, Suite 307
Austin, Texas 78701
(w/o enclosures)